

SOUTH AFRICA / JUDGMENT

Nkabinde v Commission for Conciliation Mediation and Arbitration and Others (J1812/12) [2013] ZALCJHB 161 (30 July 2013)

[2013] ZALCJHB 161

COURT

Labour Court Johannesburg

BEFORE

Mthombeni

CASE / FILE NUMBER

J1812/12

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/Not Reportable

Case no: J1812/12

In the matter between:

WILFRED BONGINKOSI NKABINDEApplicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION.....First Respondent

COMMISSIONER JOSEPH TSABADI NOSecond Respondent

SA POST OFFICE LIMITEDThird Respondent

Heard: 20 December 2012

Delivered: 30 July 2013

MTHOMBENI, AJ

Introduction

[1] This is an application brought in terms of Section 158 (1)(g) of the Labour Relations Act 66 of 1995 (“the LRA”). The Applicant seeks the following declaratory order:

1.1. That the first respondent has not complied with Rule 7 of the LRA and Rule 36 of the Conduct of Proceedings Before the CCMA and that therefore:

1.1.1. The review application under case number JR 2796/2011 be stayed permanently; and

1.1.2. That the matter be referred back to the first respondent for a de novo arbitration before a new Commissioner.

Background

[2] The applicant was in the employ of the third respondent as level 3 handler.

[3] On or about 3 January 2011, the third respondent’s client posted a cellphone handset (“the parcel”) through ordinary mail from Kagisanong, a Post Office outlet based in Bloemfontein.

[4] The parcel was addressed to Altech Autopage, Private Bag X82, Halfway House, Midrand. However, the parcel was intercepted before it could reach Altech Autopage.

[5] Subsequent to investigations by Altech Autopage, it was established that the cellphone had been in use since January 2011 by a certain lady called Lindi. When contacted, the latter stated that she had bought the cellphone from the applicant.

[6] When approached, the applicant alleged that he had bought the cellphone from a Pakistani while he was gambling at Emperors’Palace. Subsequently, he brought the cellphone back to the third respondent after having refunded Lindi.

[7] The third respondent, consequently, charged the applicant with misconduct and subjected him to a disciplinary enquiry and, ultimately, dismissed him.

[8] Aggrieved by his dismissal, the applicant approached the first respondent and declared an unfair dismissal dispute. The first respondent appointed the second respondent to arbitrate the dispute after it remained unresolved at a conciliation meeting. The second respondent confirmed the applicant’s dismissal in his arbitration award, dated 25 September 2011.

[9] Dissatisfied with the arbitration award, on 4 November 2011, the applicant made an application to this Court for the review of the arbitration award in terms of section 145 of the LRA. Subsequently, the applicant brought this application.

[10] It is common cause that during the arbitration hearing, the third respondent called three witnesses. The applicant testified and called Sipho Sithole Mahlangu (“Mahlangu”) as a witness.

[11] The record of the arbitration proceedings is, however, incomplete as the following is missing:

11.1. Part of the examination-in-chief as well as the entire cross examination tendered by the third respondent's last witness; and

11.2. The entire evidence tendered by the applicant and his witness.

Reconstruction of the record

[12] On 16 February 2012, the applicant's attorneys of record addressed a letter to the first respondent advising that the record of the arbitration proceedings is incomplete and requesting that they be furnished with the outstanding record and the second respondent's handwritten notes in order to complete their preparations for the review application.

[13] In a letter dated 5 March 2012, the first respondent replied that after a search it could not locate more recordings, conceded that the record was incomplete; advised that the second respondent's notes were missing from the file; and suggested that the parties reconvene to reconstruct the record.

[14] On 18 April 2012, the third respondent and the parties' representatives met at the first respondent's premises in Pretoria to reconstruct the record.

[15] It is common cause that the parties agreed on most issues to be incorporated into the incomplete record. However, there was disagreement concerning what Mahlangu tendered as evidence at the arbitration hearing. At the conclusion of the meeting, notwithstanding the disagreement, the second respondent produced a record of the attempts at reconstruction of the arbitration proceedings.

[16] The second respondent recorded that:

'To my understanding the evidence tendered by the applicant himself, Mr Bonginkosi Wilfred Nkabinde is not in dispute. The parties agreed that the evidence as it appears in the award is what was tendered by Mr Nkabinde on the day in question. The only witness's

testimony which the applicant seems to be unhappy with which the applicant believes that was not properly captured is the evidence of Mr Sipho Sithole Mahlangu'

Parties' contentions

[17] The applicant contended that proceeding with its review application would, in the circumstances, prejudice its case. In support of this contention, reliance was made on this Court's remark in *Public Servants Association of South Africa obo Khan v Tsabedi and Another*¹ where it stated:

‘A party who elects to proceed without the benefit of a complete record runs the risk that she will be unable to discharge the onus which is upon her. Moreover, disputes of fact will be decided according to the Plascon-Evans rule which could be obviated to some extent where there is a complete record of the proceedings (assuming, that is, that ground of review is based upon an issue which appears from the record).’

[18] The applicant also made reference to *Metalogik Engineering and Manufacturing CC v Fernandez and Others*² where this Court referred a contested issue back to the CCMA for a fresh determination, in circumstances where the arbitration record was incomplete.

[19] In support of its contention that first and second respondents had failed to give an explanation for the incomplete record and absence of handwritten notes, the applicant cited *Khan (supra)*, where this Court stated that:

‘An affidavit should be prepared by the arbitrator to explain the reasons for the lack of a proper recording in the first place and, if certain tape recordings were unavailable, the reasons or possible reasons for their absence. If the tape recordings went missing, the arbitrator’s affidavit must be accompanied by an explanation from the case manager of the CCMA or bargaining council or any other person who can swear positively to such facts, as to the record keeping system of the CCMA or bargaining council and what is likely to have happened to the missing tape recordings. (footnote omitted)’³

[20] The applicant argued that, in addition to all the above reasons, it could not take a risk and proceed with the review application and thereby waive its constitutional right to a fair hearing.

[21] The third respondent contended that the missing testimony of Mahlangu is not crucial as argued by the applicant, for even if such evidence was tendered, which the third respondent disputes, such testimony would not advance the applicant’s review application.

[22] The third respondent maintained that the extant record is adequate for the reviewing Court to determine the review application and, therefore, there is no basis for the matter to be referred back for re-arbitration.

[23] It was, further, contended by the third respondent that re-arbitration of the matter, under the circumstances, will be prejudicial to the third respondent as it is entitled to a speedy resolution of the matter.

Applicable legal principles

[24] In *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA and Others*,⁴ this Court fully explained the procedure to be followed in respect of reconstruction of a record as follows:

‘A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the commissioner) and the representatives (in this case Ms Reddy for the employee and Mr Mbelengwa for the employer) come together, bringing their extant notes and

such other documentation as may be relevant. They then endeavour to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of dispute as to accuracy or completeness.’(My own emphasis)

[25] In my view, from this perspective, it is the reviewing Court that should determine either to hear the matter on the merits and let the arbitration award in the third respondent’s favour stand or to set it aside and refer the matter for hearing de novo. It follows that it is the reviewing Court that should determine that the matter should not be heard on the merits and order that it be referred for re-arbitration.

[26] In this regard, my view is fortified by a number of decisions of this Court where, whilst seized with review applications, held either that the incomplete record or lack thereof warranted the matter to be reviewed and sent back for re-arbitration or that the incomplete record did not justify on its own to refer the matter back. For this reason, in my opinion, it is appropriate that such decisions be reserved for a reviewing Court. See *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd and Others*,⁵ where Gamble AJ, having considered all the available evidential material, declined the request to for remittal and proceeded to hear the matter on the merits.

[27] In *Papane v van Aarde N.O and Others*,⁶ Kruger AJA stated that:

‘I do not understand the decided cases, cited earlier, to preclude this Court from determining an appeal on less than a complete record in an appropriate and exceptional case, provided the Court feels able to do so on the material before it. I consider that this is such a case.’

[28] My view is, further, buttressed up by Basson J in *Doornpoort Kwik Spar CC v Odendaal and Others*,⁷ where she remarked that:

‘There is, however, clear authority to the effect that mere fact that there is no record, does not necessarily imply that the matter should as a matter of course be remitted back to the CCMA. Even where parties have endeavoured to reconstruct the record and it is not possible, the Court will likewise not as a matter of course remit the dispute back to the CCMA.’⁸

[27] The decisions of this Court that concern incomplete records or absent records were made by a reviewing Court which was better placed to consider the merits and determine whether to remit the matter back for re-arbitration. For this reason, I cannot make such a determination, for this is not an application for a review of the third respondent’s arbitration award.

[28] The applicant relied on Khan (supra) in support of its contention that the incomplete record should be sent back to the CCMA. However, while the Court remarked that a party who proceeds without a complete record runs the risk that she will be unable to discharge the onus which is upon her, it proceeded to consider the review application on the limited record.

[29] The applicant's reliance on Metalogik (supra) is misplaced, for the Court in that matter was enjoined to review an arbitration award in circumstances where the record had not been transcribed. This notwithstanding, the Court proceeded to hear the matter on the merits and remitted the matter to the arbitrator only for the purpose of a fresh determination of the issue of compensation.

[30] I am, therefore, of the view that the matter should be determined by the Court that will hear the matter on the merits under case number JR 2796/2011.

[31] In this matter, I cannot find that costs should not follow the result.

[32] In the result, I make the following order:

31.1. The application is dismissed with costs.

Mthombeni, AJ

Acting Judge of the Labour Court

Appearance:

For Applicant: Mr RN Mkhize, instructed by Mkhize Attorneys

For Respondent: Mr SE Nkwana, instructed by L Mbanjwa Inc. Attorneys

1(2012) 33 ILJ 2117 (LC) at para 14.

2 (2002) 10 BLLR 985 (LC).

3Khan, above n1 at para 26.

4(2003) 24 ILJ 931 (LAC) at para 17.

5(2004) 25 ILJ 1286 (LC) at para 21.

6(JA 25/05) [2007] ZALAC (20 March 2007) 27 at para 30.

7(2008) 29 ILJ 1019 (LC) at para 5.

8See also New Clicks SA Ltd v CCMA and Others (JR1333/05)

[2008] ZALC 171 (27 February 2008) at para 27; Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others

[2008] ZALC 29; [2005] 8 BLLR 783 (LC); Coates SA (Pty) Ltd v CCMA and Others (D199/03)

[2004] ZALC 9 (12 February 2004); Solidarity obo Botha v CCMA and Others [2009] 3 BLLR 257 (LC); Department of Justice v Hartzenberg [2001] 9 BLLR 986 (LAC).

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